No. 330.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE PETITIONERS.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE PETITIONERS.

This action was commenced by the filing of a Petition for Appointment of Conciliator by the respondent, Milwaukee Electric Railway & Transport Company, under the

provisions of the Wisconsin Statute relating to compulsory arbitration (R. 119). Thereafter, over the continuing objections and reservations of rights of the petitioners, the respondent Board of Arbitration was convened (R. 143-144, 159-160), testimony taken, and a decision and order entered (R. 162-222). Petitioners appealed such order to the Circuit Court for Milwaukee County (R. 106-115), and, from an adverse judgment of the Circuit Court (R. 225-226), to the State Supreme Court. The State Supreme Court affirmed (R. 234). Motion for Rehearing was denied (R. 239).

OPINIONS BELOW

The opinion of the Circuit Court of Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2d) 477.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Sections 111.50-111.61 thereof, and a judgment based on such statutes, are drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197; and

(b) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Wisconsin Employment Relations Board (R. 124-125, 129-130, 145-146, 157), before the Board of Arbitration (R. 161), before the Circuit Court for Milwaukee County (R. 102-103, 113-114) and before the Supreme Court of the State of Wisconsin (see decision, R. 235-236) that Sections 111.50-111.65 of the Wisconsin Statutes and more particularly Sections 111.50-111.61, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately above.

The federal question of whether the Wisconsin Statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised, therefore, before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. No specific treatment of the constitutional questions appears in the opinion since this case had been argued with the companion case now before this Court (Case No. 329, October Term, 1950). In its decision in that companion case the Court passed specifically upon the federal constitutional questions raised. In the instant case the Court referred to its opinion in the companion case and stated:

"With one exception the contentions of the appellants in this case were raised in the companion case and were determined therein" (R. 236).

In affirming the judgment of the Circuit Court, it necessarily affirmed that court's ruling (R. 102-103) that the statute was not in violation of the federal Constitution.

Thus, the Wisconsin Supreme Court has held that the State of Wisconsin can, over the objections of employees of a public utility, compel such employees to submit a dispute over wages, hours and working conditions to an ad hoc arbitration tribunal appointed by the State, and to be bound by such tribunal's determination for a period of one year; and that such procedure is not in violation of any provision of the Constitution of the United States.

QUESTION PRESENTED

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutory provisions are printed in Appendix A to this brief. They may be summarized as follows:

When a dispute arises between a "public utility employer," as defined in Section 111.51 (1), and its employees, which dispute may result in the interruption of an "essential service," as defined in Section 111.52 (2), and if the collective bargaining process has reached an impasse and stalemate, which in the opinion of the Wisconsin Employment Relations Board has occurred notwithstanding good faith efforts on the part of both sides, either party to such dispute may petition the State Board to appoint a conciliator from a panel previously created by it (Section 111.54).

If the conciliator is unable to effect a settlement of the dispute, a board of arbitration is convened, which has the duty to hear and determine the dispute (Section 111.55).

Certain standards are established with which the arbitrator's decision must comply (Secs. 111.57 and 111.58).

The award of the arbitrators is filed with the Circuit Court of the County in which the dispute arose and, unless reversed upon appeal, is binding on the parties for a period of one year (Sec. 111.59). During the pendency of the arbitration process no change may be made in existing wages, hours and conditions of employment by either party without the consent of the other (Sec. 111.56).

Strikes are absolutely prohibited (Sec. 111.62).

Section 7 of the National Labor Relations Act (29 U. S. C., Section 157) reads as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

STATEMENT

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the "union" or "Division 998," is an unincorporated, voluntary labor organization. It is the collective bargaining representative of all of the employees of The Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 108-110, 130-131).

The individual petitioners are officers of the union who are acting as individual employees and as representatives of all other employees, as well as in their official capacity (R. 109).

The respondents Wisconsin Employment Relations Board and its members (hereinafter referred to as the State Board) comprise an administrative agency created by Sec. 111.03, Wisconsin Statutes.

The respondent members of a Board of Arbitration were appointed pursuant to Sec. 111.55 of the Wisconsin Statutes (R. 143, 159).

The respondent, Milwaukee Electric Railway & Transport Co., is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce. The rolling stock, equipment and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired before these proceedings from such points outside the state being in excess of $2,000,000. Its gross operating revenue exceeds $16,000,000 annually, and it transports in excess of 100,000,000 passengers annually. Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 130-132).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to the provisions of Section 8 (a) 3 and Section 9 (e) (R. 132).

A contract between the union and the employer covering wages and working conditions of the employees represented by the union expired December 31, 1948. More than 60 days prior to that date and in accordance with the contract and the law, the union submitted to the employer written proposals for certain specified changes in the old

contract and requested a conference for the purpose of bargaining on such proposals. The employer also sent a written notice to the union, 60 days prior to December 31, 1948, stating that it was therewith terminating and cancelling said contract as of December 31, 1948 (R. 165-166).

The parties negotiated for a new contract during November and December of 1948, but arrived at no agreement (R. 134, 166). The union offered to settle the controversy by submission to a voluntary arbitration tribunal, but the employer refused such offer (R. 134).

Representatives of the Federal Conciliation and Mediation Service attempted to settle the dispute and were still attempting to do so when the jurisdiction of the State Board was invoked (R. 135).

On December 31, 1948, the company petitioned the Wisconsin Employment Relations Board, under the terms of Sections 111.54 and 111.55 of the Wisconsin Statutes, to appoint a conciliator (R. 119).

The union protested the appointment of a conciliator as well as the jurisdiction of the State Board to do so, alleging, among other things, that the statutes invoked were contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that they were in conflict with the Act of Congress known as the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197, and also contrary to the Fourteenth Amendment to the Constitution of the United States (R. 124-130).

The union's objections were overruled and a conciliator was appointed. The union participated in the conciliation proceedings as a matter of courtesy to the conciliator, reserving, however, all objections to the validity of the statute and of the proceedings (R. 137, 142, 152).

At about this time a threatened strike of the employees was restrained, on application by the Board, in the proceedings which are the subject of Case No. 329, October Term, 1950, now before this court.

On the 31st day of January, 1949, the conciliator reported to the Board that he had been unable to effect a settlement within the time allotted (R. 141-143).

Accordingly, the Board proceeded to the appointment of a three-man board of arbitration, in compliance with the statutes (R. 143-144, 158). The union participated in the proceedings leading to the appointment of the arbitrators and in the proceedings before the arbitration board without waiver of, or prejudice to, its challenges to the validity of the law, taking the position that such participation was under the duress and coercion of the law which, by precluding the union from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, placed in jeopardy such rights as job-security, pensions, and maintenance and improvement of hours, wages and other working conditions (R. 157-158, 223).

During the proceedings leading to the appointment of the arbitrators the union challenged the good-faith efforts of the employer in attempting to arrive at a settlement of the dispute, alleging that the employer had been using the Wisconsin Statutes as a shield against its duty and obligation under federal statutes to bargain collectively and in good faith, and had been relying upon automatic invocation of the Wisconsin law to relieve it from those duties and obligations (R. 128-134, 145-151, 151-154). It was further alleged that the procedure would impede settlement efforts of the Federal Mediation and Conciliation Service (R. 129). The respondent Board held it to be "wholly immaterial" that representatives of the Federal

Mediation and Conciliation Service have been attempting to conciliate the dispute (R. 137).

Prior to the introduction of evidence before the Board of Arbitration the union filed a charge against the employer with the National Labor Relations Board, alleging violation of the National Labor Relations Act by the employer, in that it had failed to bargain collectively and in good faith (R. 224-225). That matter is still pending before the National Board.

After taking evidence from the parties, the Board of Arbitration issued its decision and order which was filed, as required by statute, with the Clerk of the Circuit Court, Milwaukee County (R. 162-222).

The union duly filed a petition for review with the Circuit Court for Milwaukee County, in which it attacked the entire proceedings before the Wisconsin Employment Relations Board and the Board of Arbitration on the principal ground that the statutes under which the proceedings were conducted were null and void because in violation of the Constitution of the United States and the State of Wisconsin (R. 106-115).

On February 17, 1950, the Circuit Court issued its memorandum opinion sustaining the validity of the statutes (R. 101-106). Judgment was accordingly entered on February 23rd, 1950 (R. 225-226).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 234); rehearing was denied (R. 239).

SPECIFICATION OF ERRORS

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65 were not in conflict with the Labor Management Relations Act, 1947, 61 Stat. 136, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65 were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In affirming the judgment of the Circuit Court of Milwaukee County, dismissing petitioners' action to set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and the Board of Arbitration.

SUMMARY OF ARGUMENT

I

Since the labor-management relations involved in the instant case are clearly within the scope of the Labor Management Relations Act, 1947, and since the state law provides for compulsory settlement of labor disputes affecting interstate commerce, and thus intrudes upon a field occupied by Congress, the state law must yield if such intrusion results either in conflict with the federal law or if the federal Congress has completely occupied the field. **Hill v. Florida**, 325 U. S. 538; **International Union of United Automobile, Aircraft and Agricultural Workers, etc., v. O'Brien**, 339 U. S. 454.

A

The same reasoning and authorities which impelled the conclusion of this court in the **O'Brien** case that Congress had completely occupied the field with respect to peaceful strikes for higher wages are determinative here, since the anti-strike and compulsory arbitration provisions of the law cannot realistically be viewed as separate and distinct enactments. However, even if they are separately considered, the compulsory arbitration provisions of the law stand on no better footing than the anti-strike provisions.

1. The heart of the National Labor Relations Act of 1935 was in its purpose to eliminate industrial strife burdening interstate commerce by encouraging the policy of free collective bargaining and by protecting concerted activities in support of such right. **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 34, 42-44. Even in its limited occupation of the field, the Act was held to prevent state legislation, which was in conflict with it.

LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18; **Hill v. Florida**, 325 U. S. 538.

The more detailed regulation of the labor-management relationship which was undertaken by Congress in the Labor Management Relations Act, 1947, manifests a clear and unequivocal intent on its part to completely occupy the field to the exclusion of the states. This detailed regulation is found in the provisions of the Act regulating concerted activities of employees, the processes and subject matter of collective bargaining, and the method of settlement of disputes which burden interstate commerce. Considered with provisions recognizing state functions in a limited field, it is apparent that Congress left no room for state regulation in the broad field it occupied.

2. The legislative history and congressional debates show that compulsory arbitration was considered, but rejected as a basis for the settlement of labor disputes in public utilities. Such rejection is persuasive evidence of the congressional intent to occupy the field. **O'Brien** case, **supra.**

B

Even if state action is not excluded, the state statutory scheme must fall because of irreconcilable conflict with the federal scheme.

1. In the enactment of the Labor Management Relations Act, 1947, Congress declared its policy to eliminate obstructions to the flow of commerce by encouraging the practice and procedure of collective bargaining. While some limitations were placed on concerted activities and on the processes, details and subject matter of collective bargaining, Section 8 (d) and Title II of the Act nevertheless emphasized that the basic principles of collective bargaining were not modified but were to be supplemented by

greater use of mediation and conciliation procedures. By contrast, the state statutory scheme compels the parties to submit their unsettled disputes, whether over a new contract or interpretation of an existing contract, to a tribunal created by the state. This is directly inconsistent with the practice of collective bargaining protected by the federal Act, since with the state ready to step in and make a contract for the parties, the parties are encouraged to permit the state to release them from the responsibilities and stresses of good-faith collective bargaining.

2. Specific conflicts between the two laws occurred in the instant case. The state board found that there had been an impasse in spite of good-faith collective bargaining, contrary to the challenge made by the petitioners, and in spite of the filing of charges by the petitioners with the National Labor Relations Board that the employer had violated his obligations under Section 8 (a) (5) of the National Act.

Further conflict arose when the Board of Arbitration refused petitioners' request that certain types of employees be maintained on certain shifts because the Board felt that the provisions of the Wisconsin statute prohibited it from granting the request. Conflict also arose when the state board denied petitioners' motion to dismiss the state proceedings because of the intercession of representatives of the Federal Mediation and Conciliation Service, the state board holding that such fact was wholly immaterial to the operation of the state law.

II

The statute is in violation of the Fourteenth Amendment. (This proposition has been argued at length in companion Case No. 329, October Term, 1950, and in the interests of brevity is incorporated herein by reference.)

ARGUMENT

I

THE LAW IS CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 8, AND ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES BECAUSE REPUGNANT TO AND IN CONFLICT WITH THE PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 136

That the labor-management relations involved in the instant case are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, ¶ 141-197, and subject to the jurisdiction of the National Labor Relations Board appears from the record herein (R. 120-132) and the decided cases. **National Labor Relations Board v. Baltimore Transit Company,** 140 F. 2d 51 (C. A. 4, 1944), **cert. den.,** 321 U. S. 796; **W. C. King, d/b/a Local Transit Lines,** 91 N. L. R. B. No. 96 (October 6, 1950).

Since the business of the employer is such that its labor relations are covered by the national Act, thus imposing on both the employer and its employees reciprocal rights and duties, the principle that the state law must yield where there is conflict or where the federal Congress has pre-empted the field becomes directly applicable. **Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board,** 315 U. S. 740; **Hill v. Florida,** 325 U. S. 538; **Bethlehem Steel Company v. New York State Labor Relations Board,** 330 U. S. 767; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board,** 336 U. S. 18; **Plankinton Packing Company v. Wisconsin Employment Relations Board,** 338 U. S. 953; **International Union of United Automobile, Aircraft and Agricultural**

Workers of America, C. I. O., etc., et al. v. O'Brien, 339 U. S. 454.

The leading features of the state law which petitioners claim must yield to national policy and law are: (a) compulsory arbitration, as provided in Sections 111.54-111.60, Wisconsin Statutes, and (b) prohibition, under penalty and by injunctive process, of concerted quitting of work by employees in furtherance of their wage and working condition demands (Sections 111.62-111.63).

This brief will be confined to the compulsory arbitration features, separately from the prohibition on strikes, although it is obvious that the two features are inherently interrelated and intended to be mutually compensatory.

A

Congress Completely Occupied the Field in Which the State Law Attempts to Operate

Petitioners submit that the holding of this court in **International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., etc., et al., v. O'Brien,** 339 U. S. 454, is conclusive on the point that a state statute which absolutely prohibits strikes and requires compulsory arbitration in labor disputes involving public utilities, whose operations affect interstate commerce, intrudes upon a field which has been completely occupied by the federal Congress. The same reasoning and authorities which impelled the conclusion of the court in that case are determinative here, since the state regulation prohibiting strikes and providing for compulsory arbitration cannot, realistically, be viewed as separate and distinct enactments. The anti-strike and compulsory arbitration provisions of the state statute come to this court on separate writs only because in the lower courts they

arose in different proceedings under separate, but, it is submitted, non-severable provisions of the state law.

Even if separately considered, the compulsory arbitration provisions of the law stand on no better footing than the anti-strike provisions. Therefore, the arguments advanced in the companion case, No. 329, October Term, 1950, for application of the **O'Brien** case, supra, to the anti-strike provisions of the state law are also applicable to the compulsory arbitration provisions, and are incorporated herein by reference.

However, in the event it is held that the validity of the compulsory arbitration processes of the law must be treated separately, or raise questions distinct from those raised in connection with prohibitions or regulations of the right to strike, this brief will be limited to considerations which, though in a measure duplicate, and are supplemented by, the arguments advanced in the case dealing with the strike prohibitions of the state law, have special pertinence to its compulsory arbitration provisions.

1. The detailed regulation of the field of labor-management relations by Congress shows its intent to completely occupy that field.

With the adoption of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C., ¶ 151, and particularly by the inclusion of Sections 7 and 13 in that legislation, Congress reaffirmed and implemented the already recognized right of collective action by employees to safeguard their proper interests; it recognized that one of the most prolific causes of industrial strife was the refusal to confer and negotiate; and that collective bargaining is "likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not compel." **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 34, 42-44 (1937).

These observations of the court when the Act was first challenged were based upon matters of which it took judicial notice; previous decisions of the court in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, and **Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks**, 281 U. S. 548; and upon the declarations of policy set forth in the Act.

Subsequently, the court reaffirmed the absence of compulsion in the Act and Congressional recognition of the right of employees to strike "because of the failure of the employer to meet their demands." **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

The heart of the National Labor Relations Act, 1935, thus was in its purpose to eliminate industrial strife burdening interstate commerce by encouraging the policy of free collective bargaining, and in protecting concerted activities in support of such right and for other mutual aid or protection.

That in many important aspects the original Act had completely occupied the field, although not as comprehensively as it might have, is demonstrated by the cases holding that the states were precluded from legislating with respect to methods of determining collective bargaining representatives (**Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767; **LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18) from imposing restrictions on the eligibility of bargaining representatives to act (**Hill v. Florida**, 325 U. S. 538), and from restraining employers from engaging in practices which were also declared unfair labor practices by the federal Act (**Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953). On the other hand, only because of the absence of any parallel federal legis-

lation dealing with employee conduct, and in the absence of any showing that state action impaired federally-guaranteed rights, was it held within the state's power to enforce its law relating to disorderly conduct in connection with labor disputes. **Allen-Bradley Local 1111, etc., v. Wisconsin Employment Relations Board,** 315 U. S. 740.

With the passage of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. ¶ 141), more detailed regulation of the labor-management relationship took place—so detailed, it is submitted, so as to manifest a clear and unequivocal intent on the part of the federal Congress to completely occupy the field to the exclusion of the states, particularly with respect to the process and subject matter of collective bargaining, and the method of settlement of disputes which burden commerce.

This intent was made clear by the sweeping declaration in Section 1 (b) of the Act that:

> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

To accomplish this purpose many limitations not found in the original Act were placed upon union activities. The subjects dealt with were coercion of employees in violation of their rights under Section 7 or of employers in their selection of a bargaining representative [Section 8 (b) (1)];

strikes for certain prohibited purposes [Section 8 (b) (4)]; imposition of excessive or discriminatory fees on employees required to become members of a union under a union-shop contract [Section 8 (b) (5)]; exactions for services not performed or not to be performed [Section 8 (b) (6)]; strikes in the absence of required notice where a contract is in effect [Section 8 (d)]; restricting the eligibility of economic strikers to vote in Board-conducted elections [Section 9 (c) (3)]; use of National Board facilities without compliance with registration and financial-report requirements [Section 9 (f), (g) and (h)]; representing supervisors for the purpose of collective bargaining [Section 14 (a)]; temporary delay of strikes which might imperil the national health or safety (Sections 206-210); unlawful boycotts [Section 303 (a), (b)], and political contributions (Section 304).

To further achieve its policy Congress regulated the processes of collective bargaining by requiring unions to bargain in good faith with employers [Section 8 (b) (3)]; by setting forth the steps that must be followed for good-faith collective bargaining, and before termination or modification of an existing collective bargaining agreement [Section 8 (d)]; by assigning a definite role to the Federal Mediation and Conciliation Service in the settlement of disputes [Section 8 (d) and Title II], and by enlisting the aid of Boards of Inquiry in national emergency disputes and requiring secret-ballot votes in such disputes [Section 206, 209 (b)].

Congress also controlled and regulated the subject matter of collective bargaining by imposing greater limitations on agreements which require union membership as a condition of employment [Section 8 (a) (3)]; permitting states to impose greater restrictions on such type of agreements [Section 14 (b)]; prohibiting the assignment, from wages, of union dues or fees, except under certain circumstances [Section 302 (c) (4)]; and limiting the manner of

operation and extent of coverage of trust funds for the benefit of employees [Section 302 (c) (5)].

In addition to its own detailed regulation of the labor-management relationship, illustrated only in part by the above brief summary, in those instances where Congress thought the state could or should perform some function within the field, specific provision was made to permit its doing so. This is shown by the provisions permitting the National Board to cede jurisdiction to states having consistent legislation [Section 10 (a)]; permitting the states to enact more restrictive regulation of union-security clauses [Section 14 (b)]; and permitting state participation in the mediation and conciliation process [Sections 8 (d) (3), 202 (c), 203 (b)].

Subject only to these exceptions in favor of the state, the field that Congress covered was the entire area of labor-management disputes which would affect the free flow of commerce or cause obstructions to it. This field includes the methods for settlement of disputes, the processes and subject matter of collective bargaining, and approved and disapproved objectives to which concerted activities may be directed.

Wisconsin's plan for compulsory arbitration lies directly in that field. It represents Wisconsin's own idea of how certain labor disputes shall be settled. Its compulsory arbitration process deals with the interpretation of collective bargaining agreements [Section 111.57 (2)] and the establishment of wages, hours and working conditions [Section 111.57 (3)] which shall prevail for a period of one year (Section 111.59).

Thus, "both governments have laid hold of the same relationship for regulation * * *," and the state legislation must yield. **Bethlehem Steel Co. v. New York Labor Relations Board**, 330 U. S. 767, 775.

2. Congress expressly rejected compulsory arbitration as a method of dispute settlement within the field it occupied.

In establishing federal policy within the broad area of labor-management relationships with which it dealt, Congress had many alternatives. Among these alternatives were a number of proposals to have compulsory arbitration as the terminal point of collective bargaining, so as to prevent the disturbances of interstate commerce with which Congress was dealing. Some of these proposals specifically gave states the right to act in public utility disputes. See, Extension of Remarks of Rep. Case, Cong. Rec. A-1007. Such method of final settlement was expressly rejected both in the original and in the amended Act.

During the debates on the original National Labor Relations Act, Senator Wagner, who sponsored that Act, stated (79 Cong. Rec. 7573):

> "One method of approach to the problem of industrial peace would be for the government to invoke compulsory arbitration, or to dictate the terms of settlement whenever a controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord."

Senator Taft, co-author of the Labor Management Relations Act, 1947, and its manager on the floor of the Senate, reaffirmed this congressional purpose to avoid compulsory arbitration as a terminal point in the collective bargaining process. He said (93 Cong. Rec. 5116):

> "The Bill does not provide for compulsory arbitration. The cases in Australia cited by the Senator

from Kentucky occurred because labor there secured such a stranglehold, if you please, through statutes and otherwise on the economy of Australia, that finally the country was driven to compulsory arbitration, and, of course, it failed. Our Bill does not provide for compulsory arbitration. It seeks to reduce the power of certain unions so that when the parties come to the collective bargaining table there will be free collective bargaining in which each side will have the right to present its demands, but neither side will present any unreasonable demands, on the theory that they have such unreasonable power that they can enforce unreasonable demands.

"So, Mr. President, the Bill reaffirms the principle of the Wagner Act. It restores in this country the free collective bargaining today which both management and labor groups recognize must be the basis for satisfactory labor relations between employer and employee." (Emphasis ours.)

Similarly, the Senate Committee on Labor and Public Welfare, in its report accompanying Bill S. 1126, stated that it had considered, but rejected, proposals for compulsory arbitration for the settlement of labor disputes because experience with what amounted to compulsory arbitration during the exigencies of war showed that "employers and labor organizations tended to avoid settling their difficulties by free collective bargaining," S. Rep. No. 105, 80th Cong., 1st Sess., pp. 13, 28.

It is submitted that this congressional rejection of compulsory arbitration as a panacea for the elimination of the burdens and obstructions placed upon interstate commerce by industrial strife is just as persuasive as was the rejection of the strike-vote legislation considered in the **O'Brien** case in determining the congressional purpose to exclude state action. For, if it is not so considered, then the federal scheme for eliminating such obstructions and

burdens, relying as it does upon collective bargaining, mediation and conciliation, would become no more than a declaration of principles, to be followed or not, as the states within their discretion, deem best. Nothing would remain but a "patchwork plan for securing freedom of employees' organization and collective bargaining." **National Labor Relations Board v. Hearst Publications, Inc.**, 322 U. S. 111, 123.

It is submitted that the Act's broad declaration of purpose and policy, its specific and detailed treatment of the method and substance of collective bargaining, its special reference to state functions in particular matters, the complete absence of compulsory processes for the purpose of settling disputes or as a terminal point for collective bargaining, and the congressional refusal to adopt such compulsory processes clearly show the intent of Congress to completely occupy the field of regulation of labor disputes which interfere with or impede or obstruct the flow of commerce between the states, and that it intended no other regulation than its own. See **Santa Fe Elevator Corp.**, 331 U. S. 218, 236. It is further submitted that the Wisconsin scheme of compulsory arbitration as a terminal point in collective bargaining, and as Wisconsin's own answer to the problem of minimizing or avoiding industrial, strife, represents an intrusion by the state in such field and must therefore fall.[1] **International Union etc. v. O'Brien**, supra.

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[1] Petitioners have not discussed herein the question of whether Congress intended any different treatment of privately-owned public utilities. That it has not, is argued in Petitioners' Brief in Case No. 329, October Term, 1950, which argument is incorporated herein by reference to avoid repetition.

B

The State Legislation Is in Direct Conflict With the Federal Legislation

Even if it should be held that there was not complete occupation of the field of labor-management relations, and more particularly, the field of free collective bargaining as contrasted with compulsory arbitration, by the Labor Management Relations Act, 1947, then, nevertheless, it is submitted that the state statutory scheme must fall because of irreconcilable conflict with the federal scheme.

1. Congressional reliance on the process of collective bargaining as the most desirable policy for the settlement of labor disputes, and to accomplish the other purposes of the federal law, is frustrated by the state policy of compulsory arbitration.

Among the findings set forth by Congress in Section 1 of the Labor Management Relations Act of 1947 is included the finding that the inequality of bargaining power of employees who do not possess full freedom of association, or actual liberty of contract, burdens and affects the flow of commerce and tends to aggravate a recurrent business depression by depressing wage rates and purchasing power of wage earners in the industry. The public policy of the United States is declared to be, in Section 1, to eliminate these and other stated obstructions to commerce,

> "* * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

In furtherance of this policy, Section 7 of the original Act was left substantially unchanged, but certain limita-

tions were imposed upon the exercise of concerted activities, and on the processes and subject matter of collective bargaining, as we have already shown.

Of particular significance in ascertaining how far Congress intended that such limitations extend with respect to the settlement of disputes relating to contract negotiations, are the provisions of Section 8 (d) and Title II.

Section 8 (d) reaffirms the essentials of voluntarism and collective bargaining by requiring the parties to meet and confer in good faith with respect to wages, hours and other terms of employment, or with respect to negotiation of an agreement, or questions arising under an agreement. These obligations, however, do not "compel either party to agree to a proposal or require the making of a concession." Where a contract is in existence, sixty days' notice of intention to terminate or modify such contract at a time permissible to do so under the contract must be given [Section 8 (d) (1)], and the parties must meet and confer for the purpose of negotiating a new contract [Section 8 (d) (2)]. Notice of the existence of a dispute must be served within thirty days on the Federal Mediation Service and state mediation agencies [Section 8 (d) (3)], and terms of the contract must be continued for the sixty-day notice period [Section 8 (d) (4)]. If a strike takes place before full compliance with the section, the striking employees are deprived of their status as employees under the Act.

Thus, Section 8 (d), consistent with congressional policy and purposes, places its reliance on the process of collective bargaining and mediation by the state and federal government, permitting a strike to occur after its requirements are met.

Title II of the Act similarly and consistently sets forth this congressional reliance on collective bargaining and

the principles of voluntarism as the most effective and only desirable means of minimizing industrial disputes affecting commerce. Its provisions have already been examined in detail in Petitioners' Brief in Case No. 329, October Term, 1950. Those pertinent here may be briefly summarized as follows:

Re-emphasis is placed on the federal findings that industrial peace can most satisfactorily be secured by the processes of conference and collective bargaining [Section 201 (a)], that settlement of disputes may be advanced by making available full and adequate governmental facilities for conciliation, mediation and **voluntary** arbitration [Section 201 (b)]; and that controversies which arise under collective bargaining agreements can be minimized by governmental assistance in formulating procedures for final adjustment of grievances, which procedures are to be included in the agreement of the parties [Section 201 (c)].

The Director of the Federal Mediation and Conciliation Service is authorized to arrange for cooperation with state and local mediation services [Section 202 (c)]; a duty is placed upon the Service to assist the parties to settle their disputes through conciliation and mediation [Section 203 (a)], but if such dispute will have only a minor effect on interstate commerce, the Service is not to intercede if state or other conciliation services are available to the parties [Section 203 (b)]; the Director of the Service is to induce the parties to voluntarily seek other means of settlement if conciliation and mediation fails, including secret-ballot vote on the employer's last offer, but failure to accept any procedure suggested by the Director is not a violation of any duty under the Act [Section 203 (c)]; disputes arising under contracts are to be settled expeditiously and, if not, the parties must participate promptly in meetings called by the Service for that purpose of aiding in settlement (Section 204).

Sections 206 through 210 of Title II set forth a special method of handling disputes which imperil the national health or safety and provide for temporary restraint of strikes or threatened strikes in connection with such dispute, pending fact-finding procedures and secret-ballot elections of the employees. After the expiration of the "cooling off" period, the strike is permitted to run its course. Even in these cases of acute emergency, Section 209 (a) provides that "neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service."

Contrasted with the federal policy of voluntarism and aids to collective bargaining, the state statutory scheme compels the parties to submit their disputes, whether over a new contract or interpretation of an existing contract, to a tribunal created by the state; and requires the parties to abide the directions of such tribunal with respect to the wages, hours and conditions of work which shall prevail among the employees of the particular employer for a period of one year (Sections 111.57-111.60). The jurisdiction of the state Board of Arbitration to interpret contracts [Section 111.57 (2)] is not only directly contrary to the federal policy, expressed in Sections 201 (c) and 204 of the federal Act, that such matters should be handled by voluntary agreement,[2] but is also in violation of the principle that contract interpretation is a proper subject of negotiation. **National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332, 342. Additionally, this function of the State Arbitration Board impinges on the duties of the National Board which is required to interpret contracts to ascertain if there is violation of the federal Act. **National Licorice Co. v. National Labor Relations Board**, 309 U. S. 350, 359-360.

2 Consistent with federal policy, petitioners offered to arbitrate the instant dispute in voluntary proceedings, but such offer was rejected by the employer (R. 128, 134) and considered immaterial by the state board (R. 137).

Clearly the state thus supplies a different diluted and inconsistent substitute for the process of full and free collective bargaining established by Congress under the national Act.

The state apparently believes that its remedy is just as good for the workers involved, and better for the rest of the population, than the one prescribed by Congress. Concededly, the remedy prescribed by Congress in Section 7 includes as a necessary, although sometimes bitter ingredient, the ultimate right to strike. But the congressional prescription is based upon its belief that without such right to strike there cannot be genuine collective bargaining.

The practice of collective bargaining, as it has developed historically, and as it is protected by Section 7 of the federal Labor Act, necessarily excludes the subjecting of the participants to a threat (or promise), even before the parties sit down to negotiate, of a governmental decision concerning wages and working conditions if the parties disagree. For if the alternative to a stalemate in negotiation is the right of the parties to obtain the decision of a tribunal as to the disputed terms, then the process of negotiation is, from its very inception, not a bargaining for services, but a compromise of the hazards of the tribunal's decision. In such a situation the resulting compromise—if there is a compromise rather than a resort to the tribunal—is not a result of a free bargain for the employee's services, and does not represent the fair value which could be obtained by genuine collective bargaining.

This is one of the many reasons why proposals to establish a national policy of compulsory arbitration in public utility and other important industries were rejected by the 80th Congress, as we have already pointed out. This reason was stated by Senator Taft as follows (93 Cong. Rec. 3835):

"We did not feel that we should put into the law as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided."

The conclusion of the Congress of the United States that compulsory arbitration would tend to destroy free collective bargaining is an accurate reflection of the experience of many competent observers of, and experts in, the field of industrial relations.

Before the House Committee on Education and Labor, which reported Bill H. R. 3020, the then Secretary of Labor (Lewis B. Schwellenbach) testified, on March 11, 1947, as follows:

"Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realized through their own efforts. The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration pro-

cedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently. Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes" [Legislative History of the Labor Management Relations Act, p. 392 (Government Printing Office, 1948)].

In the Proceedings of the Second Annual Meeting of the Industrial Relations Research Association, at pages 14-27, Thomas Kennedy, Assistant Professor of Industrial Relations, University of Pennsylvania, in a study entitled "The Handling of Emergency Disputes," sets forth the results of research covering some four years of operations of the New Jersey Compulsory Arbitration Statute (N. J. S. A. 34: 13B-1 et seq.). With respect to what constitutes a public emergency, it is pointed out that strikes in telephone service and in local transit services do not actually cause a public emergency, and that strikes in the electric light and power industry, even if they are complete, do not result in any immediate jeopardy of public health and safety, as had been anticipated.

The answer to the question, "What is there in the nature of compulsory arbitration which makes it difficult for free collective bargaining to function effectively when such a law is in effect?" was found in the following:

1. "* * * the fear of each negotiating party to suggest what appears to him to be a reasonable basis for settlement, especially of a wage issue, lest the other side use the offer merely as a springboard for securing for itself a better settlement through compulsory arbitration. * * * Negotiations are thus

stymied and compulsory arbitration is both the cause and the result of the failure of free collective bargaining."

2. "* * * the fear of negotiators to assume responsibility for a settlement when better terms might possibly be secured through compulsory arbitration."

3. "* * * the difficulty of 'washing out' the unessential demands of the parties."[3]

4. "* * * a tendency now to prepare for annual arbitration rather than for annual negotiations."

5. "* * * a company may prefer to use compulsory arbitration when it is available if it is of the opinion that the granting of what it considers a reasonable and necessary wage raise will necessitate an increase in the rates to be paid by the public for its service."

After pointing out that these factors vary from industry to industry and from company to company, it is reported that:

"Labor, management, and representatives of the public, however, generally agree, and the record supports their belief, that compulsory arbitration has had a very damaging effect on free collective bargaining in New Jersey public utilities."[4]

Result of the research is summarized as revealing that perhaps the greatest cost of outlawing public utility strikes and substituting seizure and compulsory arbitration is the crippling effect on collective bargaining; that experience proves that strikes in public utilities do not result in immediate jeopardy to public health and safety and, therefore, there is room for permitting threats of

[3] An illustration of this occurs in the instant case (R. 167).

[4] A similar conclusion is reported in MacDonald, Compulsory Arbitration in New Jersey, 625, 701 (New York University Second Annual Conference on Labor, Mathew Bender & Co., 1949).

strikes and strikes to perform their functions which are so essential to free collective bargaining; and that if a real threat to public health and safety should occur, the general emergency powers of the state or federal government are always available.[5]

That the availability of the state process of compulsory arbitration becomes increasingly relied upon by labor and management, to the prejudice of free collective bargaining is also shown by Wisconsin's own experience. During the fifty years preceding passage of the Wisconsin law there had been approximately ten strikes of public utility workers. Polner, Some Aspects of the Recent State Legislation to Prohibit Strikes in Public Utilities, p. 45 et seq. (Unpublished study, Department of Economics, University of Wisconsin, 1948). Yet, in one year of operation under the Wisconsin law, fifteen cases had been received by the Wisconsin Board for handling by it. Of these cases, nine had been filed by unions, three by employers, and in three the Board intervened. Eleventh Annual Report, Wisconsin Employment Relations Board, p. 28 (1948-1949). Bearing in mind that the provisions of the Wisconsin law become applicable on a showing of impasse or stalemate in collective bargaining which may lead to an interruption of an essential service, and bearing in mind that strikes in public utilities in Wisconsin have been rare occurrences, it is reasonable to assume that impasses have been created, and strikes threatened, so that either party can thrust upon the state the burden of making a contract, rather

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[5] Eminent representatives of the public and industry have similarly expressed the conviction that compulsory arbitration in public utilities is inconsistent with, and destructive of, free collective bargaining. See Frey, The Logic of Collective Bargaining and Arbitration, 12 Law and Contemporary Problems 264, 271; Fitzpatrick, The Settlement of Contract Negotiation Disputes: A Business Viewpoint, 12 Law and Contemporary Problems 346, 353; Friedin, The Public Interest in Labor Dispute Settlements, 12 Law and Contemporary Problems 365, 372; George W. Taylor, Government Regulation of Industrial Relations (Prentice-Hall, Inc., 1948); Labor and National Defense (Twentieth Century Fund, 1941); the President's National Labor-Management Conference (Bulletin No. 77, United States Department of Labor, Division of Labor Standards, 1946).

than permitting the processes of free collective bargaining to fulfill their functions.

It can thus be seen that there is a basic and irreconcilable conflict between the theories of free collective bargaining and compulsory arbitration. The two systems cannot consistently stand together, even though, as the state argues, its processes do not take place until after collective bargaining has reached an impasse or stalemate. For, as we have shown, there can be no such thing as the good-faith collective bargaining required under the National Act where the state provides for compulsory arbitration as a sort of rear-door through which either party may escape from its obligations and transfer its duty of making a contract to the state.

The availability of the compulsory arbitration procedure provides a release from the unremitting economic stress to stay at the give-and-take process of the bargaining table until a voluntary agreement is reached, because, instead of allowing the force of economic pressures to break a stalemate or impasse, this statute permits either of the parties to escape from the responsibility, often heavy, of making concessions.

2. **There is also specific conflict between the state and federal law as they relate to collective bargaining.**

Not only does the general scheme of compulsory arbitration embodied in the state law conflict with the federal law, but specific provisions of the Wisconsin law also demonstrate the inability of the two laws to consistently operate in the same field.

a. The arbitration process of the Wisconsin law is set into motion upon a state board finding that "in its opinion the collective bargaining process, notwithstanding good-faith efforts on the part of both sides to such dispute, has

reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause an interruption of an essential service" (Section 111.54). Thus "at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6) the state steps in and deprives the employees of their rights under federal law and relieves the employer of his duties under such law. This point was considered so important in the entire scheme of the federal Act that it was the reason for defining the term "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * " [Section 2 (3)] and so prevent withdrawal of the government from the field when the critical point was reached (S. Rep. No. 573, supra). Additionally, a determination as to whether or not there has been a refusal of either party to bargain in good faith is made under the Wisconsin law by the state board. However, since the employer here is subject to the federal Act, exclusive jurisdiction to make such finding is vested in the National Labor Relations Board [Sections 8 (a) (5), 8 (b) (3), 10 (a)]; **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953. One of the motions made by petitioners to dismiss the proceedings was based on its allegation that there was no impasse or stalemate in the collective bargaining process, notwithstanding good-faith efforts on the part of both sides to the dispute (R. 128). This motion was denied by the state board (R. 137). Subsequently, petitioners invoked the superior jurisdiction of the National Board to make the determination on that question (R. 144). The state board, nevertheless, continued to exert the jurisdiction which it had assumed.

b. Specific conflict also arises by reason of Section 111.58 of the state act which provides "that the arbitrator shall not make any award which would infringe upon the right

of the employer to manage his business." The state thus removes from the area of relief which can be granted to the employee those matters over which the employer and union must bargain collectively. In the instant case, this section became directly involved in connection with a union request that certain types of employees be maintained on certain shifts. The Board of Arbitration refused to grant such request, solely because of its lack of power to do so under the above quoted provision of the statute (R. 198).

The process of collective bargaining and the entering into of signed agreements incorporating the results of such bargaining must of necessity infringe in some way or other upon the right of the employer to manage his business in the absolute and unrestricted sense. Any concession made by an employer during the process of collective bargaining results in such infringement.

Under federal law, any matter dealing with wages, hours or conditions of employment is a proper subject for collective bargaining, subject only to compliance with legislative regulation of the same subject. **Matter of Consumers' Research, Inc.**, 2 N. L. R. B. 57; **Matter of Timken Roller Bearing Co.**, 70 N. L. R. B. 500; **National Labor Relations Board v. Inland Steel Co.**, 170 F. 2d 247 (C. A. 7, 1948), **cert. den.** 336 U. S. 960. So here the state has not only relieved the employer from its duty to bargain collectively by providing the rear exit of compulsory arbitration, but at the same time has precluded the employees from attaining in the compulsory arbitration process that which they might have otherwise attained in collective bargaining.[6]

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[6] A more glaring example of a similar result under state laws is provided by the recent decision of the Supreme Court of New Jersey in the case of **New Jersey Bell Telephone Co. v. Communications Workers of America, etc., et al.**, ... N. J. ... (not yet officially reported), in which an award of a union shop by a statutory arbitration board was reversed, notwithstanding the union's compliance with the requirements of the federal Act, because it did not result from free collective bargaining within the contemplation of the federal Act.

c. We have already pointed out in Petitioners' Brief in Case No. 329, October Term, 1950, the inconsistencies in the mediation procedures of the Wisconsin Act as compared with those procedures of the federal Act, and to the report of the Director of the Federal Mediation and Conciliation Service that such state laws are interfering with the duties imposed on the service by Congress. An actual instance of that type arose in the instant case, during the proceedings preliminary to the appointment of the Board of Arbitration. Among the motions made by petitioners, one was made to dismiss the proceedings because representatives of the Federal Mediation and Conciliation Service of the United States Government had been and still were seeking to settle the controversy, and that the appointment of a conciliator by the Wisconsin Board would result not only in a duplication of effort, confusion, and conflict, but would also result in interfering with the operation of federal laws and agencies contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States (R. 129). The allegation with respect to the intervention of the Federal Mediation and Conciliation Service was supported by a sworn affidavit (R. 134-135). In passing on this motion, the Chairman of the respondent Board stated (R. 137):

> "• • • we think it is wholly immaterial whether the representatives of the Federal Mediation and Conciliation Service had been attempting to conciliate this dispute or whether anybody else has been attempting to conciliate this dispute."

It is submitted that these three examples of direct conflict and inconsistency served to underline the basic soundness of the decisions which preclude the state from adopting legislation in a field which has been occupied by the Congress, or, if not occupied, which is directly in conflict with the federal Act.

II

THE STATUTE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT

That the Wisconsin statute deprives of rights assured under the Fourteenth Amendment has been already argued in the companion Case No. 329, October Term, 1950. In the interests of brevity, that argument is incorporated herein by reference.

CONCLUSION

It is respectfully submitted that the Wisconsin statute and the judgment based on such statute are in violation of Article I, Section 8, and Article VI of the federal Constitution because they intrude upon or are in conflict with congressional action in the same field; and are in violation of the Fourteenth Amendment to the federal Constitution because they deprive of liberty and property without due process of law. For these reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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SAUL COOPER,
Of Counsel.

APPENDIX A

Wisconsin Statutes

SUBCHAPTER III

Public Utilities

111.50 **Declaration of Policy.** It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 **Definitions.** When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat,

gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employes.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 **Settlement of Labor Disputes Through Collective Bargaining and Arbitration.** It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 **Appointment of Conciliators and Arbitrators.** Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal

with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 **Conciliation.** If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 **Conciliator Unable to Effect Settlement; Appointment of Arbitrators.** If the conciliator so named is unable

to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 **Status Quo to Be Maintained.** During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 **Arbitrator to Hold Hearings.** (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the employes having regard not only to wages for time actually worked, but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as preclud-

ing the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 **Standards for Arbitration.** The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 **Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed be-

tween the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

111.60 **Judicial Review of Order of Arbitrator.** Either party to the dispute may, within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review hereinabove set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61 **Board to Establish Rules.** The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 **Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.** It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work

stoppage or slowdowns which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63. **Enforcement.** The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 **Construction.** (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent; or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at hi[illegible]lace of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65. **Separability.** It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.